

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

Portland Division

UNITED STATES OF AMERICA

3:98-CR-56-MA

Plaintiff-Respondent,

OPINION AND ORDER

v.

JORGE BRAVO-BRAVO,  
aka Jesus Andrade-Perez

Defendant-Petitioner.

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MARSH, Judge.

The matter is before the Court on defendant's Petition for Writ of *Audita Querela*, or in the alternative, for Writ of *Coram Nobis* (doc. 50). For the following reasons, the court **DENIES** the Petition.

#### **BACKGROUND**

In 1998, defendant Jorge Bravo-Bravo, aka Jose Perez Andrade, was convicted in this court of possession with intent to distribute methamphetamine and sentenced to 70 months imprisonment. In reaching that sentence, the court determined that, under the Sentencing Guidelines in effect at the time, defendant's assigned Criminal History Category of IV, with a sentencing range of 84-105 months, over-represented the seriousness of his past criminal conduct. Accordingly, the court granted a downward departure to Criminal History Category III resulted in the 70 month sentence, which is at the low end of the sentencing guideline range of 70-87 months.

At the time he was sentenced, defendant's criminal history included a 1995 California conviction for Possession of Cocaine for Sale. Accordingly, that conviction, was a factor in the 1998 sentence he received in this court.

In January 2010, however, a California court vacated defendant's 1995 conviction for Possession of Cocaine for sale and in its place, convicted him of Simple Possession of Cocaine.

In March 2011, defendant was indicted in the Eastern District of California on a charge of Illegal Reentry. Defendant contends the subsequently modified 1995 California conviction will have a snowballing effect on the sentence he is likely to receive in the Eastern District of California on the pending charge in that it adversely impacted his 1998 federal sentence, which in turn, will adversely impact the Criminal History Category into which he is placed for purposes of sentencing on the pending illegal reentry charge.

In light of the above, defendant now seeks to vacate his plea and sentence in the earlier 1998 federal case, in order to "Alter the *Platform* on Which He Can Make Sentencing Pleas" in the pending case before the court, *i.e.*, present a criminal history to the sentencing judge that takes into account that his 1995 conviction was vacated.

#### **STANDARDS**

The common law writs of Audita Querela and Coram Nobis survive "only to the extent they fill in gaps in the current systems of post-conviction relief." Carrington v. United States, 503 F.3d 888, 890 (9<sup>th</sup> Cir. 2007). Such writs are inappropriate if the requested relief is available under 28 U.S.C. § 2255. United States v. Gamboa, 608 F.3d 492 (9<sup>th</sup> Cir. 2011).

A Writ of Coram Nobis may issue only if all of the following elements are met: "(1) a more usual remedy is not available;

(2) valid reasons exist for not attacking the conviction earlier; (3) adverse consequences exist from the conviction sufficient to satisfy the case or controversy requirement of Article III; and (4) the error is of the most fundamental character." U.S. v. Riedl, 496 F.3d 1003, 1006 (9<sup>th</sup> Cir. 2007) (emphasis added).

A Writ of Audita Querela is available as a remedy in claims that are not cognizable under a 28 U.S.C. § 2255 habeas petition, but, as with Writs of Coram Nobis, "serve to fill in 'gaps' in the current systems of post-conviction relief." Carrington v. U.S., 503 F.3d 888, 890 (9<sup>th</sup> Cir. 2007). "The writ of audita querela provides relief from the consequences of a conviction when a defense or discharge arises subsequent to entry of the final judgment. The defense or discharge must be a legal defect in the conviction or in the sentence which taints the conviction. Doe v. INS, 120 F.3d at 203 (quoting United States v. Johnson, 962 F.2d 579, 582 (7<sup>th</sup> Cir. 1992)).

### DISCUSSION

#### **Writ of Coram Nobis.**

Defendant contends a Writ of Coram Nobis is an appropriate remedy because the 1998 drug trafficking conviction "informed and shaped the very nature of the 1998 proceeding itself." As such, it gave a "false view" of petitioner as a drug trafficker rather than merely a drug user. According to defendant, that false view

"informed and shaped the very nature of the 1998 proceeding," thereby making the error "fundamental" in character.

The government disagrees, contending the Writ of Coram Nobis remedy is not available because defendant's 1998 conviction was not subject to an error "of the most fundamental character," in that it did not call into question the validity of the proceeding itself. See United States v. Addonizio, 442 U.S. 178, 186 (1979):

Coram nobis was available to bring before the court that pronounced the judgment errors in matters of fact which had not been put in issue or passed upon and were material to the validity and regularity of the legal proceeding itself; as where the defendant, being under age, appeared by attorney, or the plaintiff or defendant was a married woman at the time of commencing the suit, or died before verdict or interlocutory judgment.

(Emphasis added).

The court agrees with the government that defendant questioned the validity a prior conviction in 1995 and its impact on the sentence he received as a result of the 1998 conviction. The validity of the 1998 conviction, however, was not at issue. Under these circumstance, the court agrees with the government that the remedy arising from a Writ of Coram Nobis is not available to challenge the sentence imposed by the court in 1998. Lowery v. United States, 956 F.2d 227, 230 (11<sup>th</sup> Cir. 1992).

If defendant seeks consideration of the above circumstances at the time he is sentenced on the illegal reentry charge, the

appropriate course of action for him to take is to seek a variance or a downward departure under 18 U.S.C. § 3553(e).

Based on the above, the court agrees with the government that defendant's challenge to the 1998 California sentencing proceeding does not implicate the validity of the proceeding itself and, therefore, the extraordinary remedy sought by defendant under the Writ of Coram Nobis is unavailable to defendant.

**Writ of Audita Querela.**

In the modern era, the Writ of Audita Querela, similar to the Writ of Coram Nobis, "survive[s] 'only to the extent [it] fills in gaps in the current systems of post-conviction relief.'" Carrington v. United States, 503 F.3d 888, 890 (9<sup>th</sup> Cir. 2007). It serves to provide relief "from the consequences of a conviction when a defense or discharge arises subsequent to the entry of the final judgment. The defense or discharge must be a legal defect in the conviction, or in the sentence which taints the conviction." U.S. v. Crowell, 374 F.3d 790, 795 (9<sup>th</sup> Cir, 2004). The issue now raised by defendant does not implicate a legal defect in the 1998 conviction itself, and the sentence which arose from it at that time.

Again, the court agrees with the Government that the "more usual remedy" available to defendant is his ability to urge the

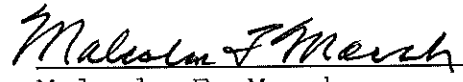
court, in its discretion, at the time of sentencing, to address the issues he raises in the pending Petitions.

**CONCLUSION**

For the reasons stated above, the court **DENIES** defendant's Petition for Writ of Audita Querela, or in the alternative, for Writ of Coram Nobis (doc. 50).

IT IS SO ORDERED.

DATED this 13 day of January, 2012.

  
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Malcolm F. Marsh  
United States District Judge